IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8109 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DEESA NAGRIK SAHAKARI BANK LTD

Versus

PATEL HARIBHAI CHATURBHAI

Appearance:

1. Special Civil Application No. 8109 of 2005

MR PK JANI for Petitioner No. 1

MR LN MEDIPALLY for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 09/05/2005

ORAL JUDGEMENT

1. Shree Deesa Nagarik Sahakari Bank Ltd., petitioner, have filed this petition with a prayer that this Court may be pleased to issue a writ of certiorari or any other appropriate writ, order or direction, quashing and setting aside the judgment and order passed by the learned Members of the Gujarat State Co-operative Tribunal, in Review Application No.44 of 2004 dated 11th April, 2005, which is produced at Annexure "K" to the petition. The petition was filed on 2nd May, 2004.

2. Heard Mr.P.K.Jani, learned advocate for the

petitioner.

2.1 The facts giving rise to this petition are as under:-

2.2 The petitioner is the Manager of Madhavpura Branch of Shree Deesa Nagarik Sahakari Bank Ltd, having its head office at Deesa, Taluka Deesa, District Banaskantha. The petitioner bank had given loan to one firm named as M/s.S.B.Traders and in the said loan transaction, present respondents No.1 and 2 stood guarantors. Respondent No.2 herein is the wife of original defendant No.2 Vishnubahi Agrawal, who had mortgaged the property with the bank, being the guaranty for the loan which is advanced to S.B.Traders. The said firm namely M/s. S.B.Traders and its partners failed to repay the amount of loan advanced by the petitioner bank.

2.3 Thereafter the petitioner bank filed Lavad Suit No.1970 of 2002 before the Registrar, Nominees Court at Ahmedabad, for recovering an amount of Rs.28,56,848/(Rupees Twenty Eight Lacs Fifty Six Thousand Eight Hundred & Forty Eight only) with running interest at the rate of 22.5% from 1st June 2002.

2.4 In the said suit, it was prayed that the decree be passed for the said amount from all the defendants including present respondents No.1, 2 and 3 who were defendants No.4, 5 and 6. The Registrar, Nominees Court, by its order dated 10th December, 2002, directed the defendants No.1 to 3 to deposit an amount of 20% of the suit claim as a condition for leave to defend . The defendants No.4, 5 and 6 i.e. present respondents No.1, 2 and 3 were ordered to deposit an amount of 13.5% of the claim of the suit and, on that condition, the leave to defend was granted to defendants No.4, 5 and 6 i.e. present respondents No.1, 2 and 3.

2.5 Thereafter in the plaint, the claim amount was Rs.28,56,848/- from 1st July, 2002, with 22.5% interest. So, 13.5% of Rs.28,56,848/- would come to Rs.3,85,674.50 ps/-. Therefore, each one of the defendants No.4, 5 and 6 was required to deposit the said amount with the petitioner bank, as a condition to defend the suit. However, none of the defendants including present respondents No.1, 2 and 3, who are defendants No.4, 5 and 6 deposited the amount.

2.6 The Registrar, Nominees Court, by way of judgment and award dated 10th March, 2003, passed a decree in favour of the petitioner bank, directing all the

defendants including present respondents No.1, 2 and 3 (original defendants No.3, 4 and 5) to pay the amount of Rs.28,56,848/- from 1st June, 2002, with running interest at the rate of 22.5%. However, the present respondents did not take any steps to challenge the judgment and award passed by the Registrar, Nominees Court, for a very long time and did not file appeal within the prescribed period of limitation, as available under the provisions of the Gujarat Co-operative Societies Act.

2.7 It is only when the respondents came to know that the petitioner bank is in the process of execution of the decree that they filed appeal before the Gujarat State Co-operative Tribunal, challenging the judgment and award passed by the Registrar, Nominees Court, in Lavad Suit No.1970 of 2002. Since the appeal was preferred after the period of limitation, respondents No.1, 2 and 3 filed application for condonation of delay. The said application for condonation of delay was numbered as Misc.Application No.68 of 2004. The application filed by the original defendants No.1, 2 and 3 was numbered as Misc.Application No.69 of 2004.

2.8 The learned Member of the tribunal, Shri R.M.Thakkar, granted unconditional stay. Similarly, in the case of the principal borrowers also, the learned Member of the tribunal granted unconditional stay.

2.9 The petitioner-bank thereafter filed Special Civil Application No.2224 of 2004, before this Court, challenging the validity of the interim order passed by the Gujarat State Co-operative Tribunal in Misc.Application No.69 of 2004. In the said writ petition, this Court initially passed orders on 23rd February, 2004, 8th March, 2004, and 26th March, 2004. By the order dated 23rd February, 2004, this Court direct the respondents of the said petition to deposit an amount of Rs.5.00 lakhs. Thereafter this Court by order dated 21st September, 2004, has been pleased to dispose of the said petition with certain directions.

3. Mr.Jani, learned advocate for the petitioner has invited my attention to the order of this Court which is also produced before this Court in this matter. The learned Members of the tribunal, by order dated 30th June, 2004, has been pleased to reject the application for condonation of delay being Misc.Applications No.68 of 2004 and 69 of 2004. Thereafter, the respondents herein filed Review Application No.44 of 2004 before the Gujarat State Co-operative Tribunal, praying that the order passed by the tribunal in Misc.Application No.68 of 2004,

on 30th June, 2004, be reviewed and the application may be granted. In the said review application, application for stay is also filed.

3.1 The learned Members of the Gujarat State Co-operative Tribunal allowed the application for review filed by the respondents herein and stayed the judgment and award passed by the Registrar, Nominees Court in Lavad Suit No.1970 of 2002 by its order dated 11th April, 2005.

3.2 Mr.Jani, learned advocate for the petitioner has submitted that the tribunal granted review of the order has not considered the principle of review. He has also invited my attention to the judgment of the Hon'ble Apex Court in the case of Lily Thomas and others Vs. Union of India and others reported in (2000) 6 SCC 224, particularly para 52 onwards from page 247 where the Hon'ble Apex Court held that, the mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength. Thereafter the Hon'ble Apex Court in para 53 and 54 has also considered the principle of review and thereafter in para 56 on page 251 the Hon'ble Apex Court has laid down regarding the principle of review.

3.3 Mr.Jani, learned advocate for the petitioner has also invited my attention to the fact that both the respondents No.1 and 2 was stood as guarantors and he has shown the guarantee deed which is produced on page 33 of the paper book. He has also invited my attention to the affidavit filed by Vishnubhai S.Agrawal and his Wife Madhuben Agrawal which is produced at page 43 where they have signed on 9.2.2000 as well as affidavit-cum-undertaking filed on 9.2.2000 which is produced at page 45 and further affidavit-cum-undertaking of Vishnubhai Agrawal is produced at page 47 of the petition.

3.4 He has also invited my attention to the earlier order passed by this Court in Special Civil Application No.2224 of 2004 dated 23.2.2004 which is produced on page 110 and also order of this Court dated 26.3.2004 page 115 and final order passed by this Court dated 21.9.2004 which is produced on page 118.

4. I have considered the facts and circumstances of the case. When the tribunal has allowed the review application without imposing any condition, the same requires consideration. Hence, RULE. Mr.L.N.Medipally, learned advocate waives service of rule on behalf of

respondents No.1 to 3.

5. Mr.Jani, learned advocate for the petitioner has stated that the decree is passed on 10th March, 2003, which is produced at page 104 where the Board of Nominee has passed a decree of Rs.28,56,848/- with running interest 22.5%. Now that amount comes to Rs.44,71,510/-.

6. Mr.Jani, learned advocate for the petitioner has, therefore, submitted that effect of order of the tribunal dated 11.4.2005 produced at page 142 of the paper book is that the tribunal has allowed the review application and now the tribunal will hear the matter afresh both on merits as well as delay condonation application, but while doing this, the tribunal did not impose any condition upon the respondents. To that extent, the order of the tribunal is not correct in this behalf. He has also invited my attention to the earlier order passed by this Court in Special Civil Application No.2224 of 2004 dated 23.2.2004 wherein in the matter of same bank against S.B.Traders this Court direct that payment of Rs.5.00 lakhs which is produced at page 110 and 111 of the paper book as well as further order dated 26.3.2004 which is produced at page 115 of the paper book.

7. It may be noted that though this Court finally disposed of the matter, however, the said directions was not disturbed. All these orders were part of the proceedings where the bank has initiated action against principal borrower. The tribunal, while accepting the review application, ought to have impose certain conditions, because large amount of Rs.44,71,510/- is due and payable by the respective respondents to the bank, and bank money being a public money, the tribunal ought to have consider this aspect. As the tribunal failed and neglect to consider this aspect, the order of the tribunal is bad in law.

8. Mr.Medipally, learned advocate for the respondents has vehemently opposed the said contention, and he has stated that, even if, the order of the tribunal is wrong, this Court may not interfere in this behalf and allowed the tribunal to go on with the main matter, and after tribunal examine the same, the tribunal may impose certain conditions in this behalf.

9. I have considered the facts and circumstances of the case. In my view the bank could able to show prima facie case. Not only prima facie case, even balance of convenience is also lies in favour of the bank, as large amount is due and payable by the respondents in this

behalf. The tribunal has only allowed the review application and restored the matter. It will be open for the tribunal to consider the main matter as well as delay condonation application on merits of the matter. However, if I pass the following order the same will be in the interest of justice.

10. I have calculated that the total amount is approximately Rs.44,71,510/-. However, I roughly consider that about 1/3rd of that amount has to be paid while proceedings are going on then it comes to about Rs.15.00 lakhs. So, in my view, if this Court direct that all the three respondents shall pay together Rs.15.00 lakhs or the respective respondents i.e. respondents No.1 to 3 shall pay Rs.5.00 lakhs each, the same will be in the interest of justice. The respondents have not been able to show any factor in their favour. That is why this Court constrained to pass this order. This Court directed the respondents to pay the aforesaid amount of Rs.15.00 lakhs by 18th July, 2005.

11. If the respondents No.1 to 3 failed and neglect to make the payment, as directed by this Court, the stay granted by the tribunal will automatically vacated. Rule is made absolute to the aforesaid extent. The tribunal is directed to decide the delay condonation application as well as appeal without being influenced by the order of this Court and decide the same in accordance with law.

12. After the aforesaid order is dictated, Mr.Medipally, learned advocate for the respondents requested that this Court may stay the order for 15 days with a view to approach the higher forum. In view of the same, this order is stayed upto 25th May, 2005.

(K.M. Mehta, J.)

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